2008 Environmental Law Conference at Yosemite®

Session 17

"*Smelt-down: Endangered Species and Water Supply in Crisis*"

Supplemental Materials

SMELT-DOWN: ENDANGERED SPECIES AND WATER SUPPLY IN CRISIS

2008 ENVIRONMENTAL LAW CONFERENCE AT YOSEMITE

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I. The Bay-Delta in Context

The delta smelt are endemic to the Sacramento-San Joaquin River Delta ("Delta") /San Francisco Bay area ("Bay-Delta"), which is currently designated as critical habitat for the delta smelt. The Delta is widely known to be a hub for distribution of water emptying into the Bay-Delta estuary to other regions of California, including the Central Valley and Southern California. The Bay-Delta estuary includes California's two largest rivers, the Sacramento, which flows into the Delta from the north, and the San Joaquin, which flows into the Delta from the south. Water that accumulates in these rivers flows through the Delta and is either diverted elsewhere or goes into Suisun Bay and, from there, continues to the San Francisco Bay and then the Pacific Ocean. (*See generally: In re Bay-Delta Envtl Impact Report Coordinated Proceedings*, 133 Cal.App.4th 154, 170 (3rd DCA, 2005) (Reversed by *In re Bay-Delta Programmatic Envtl. Impact Report Coordinated Proceedings, 2008 Cal. LEXIS 6737 (2008)* (cited here for factual background only).

The Delta consists of major transportation networks, towns, homes, and businesses and a maze of tributaries, sloughs and islands covering over 738,000 acres in five counties. Around 641,000 acres in the Delta area have been classified as some of the highest quality soils for agricultural production in California. In the San Joaquin River region, 1996 figures show over 3.7 million acres of important farmland; in the Sacramento River region over 2.4 million acres; in the Bay region, including the counties of Contra Costa, Solano, Napa, and Sonoma, approximately 493,000 acres.

Areas influenced by the Delta hub include the Central Valley, which stretches nearly 500 miles from Redding in the north to Bakersfield in the south and more than 100 miles from the Sierra Nevada in the east to the coastal ranges in the west, and Southern California, home to two-thirds of the state's population and approximately 2.1 million acres of important farmland. Delta water deliveries help to sustain a $36.6 billion farming industry and a significant contribution to California's $1.6 trillion gross state product by a combination of Silicon Valley companies in the Bay region and energy, tourism and entertainment industries south of the Delta. (*See* Legislative Analyst's Office Cal Facts 2006, California's Economy and Budget in Perspective, *available at* http://www.lao.ca.gov/2006/cal_facts/2006_calfacts_econ.htm.)

Average annual precipitation in the state is a meager 24 inches, ranging from as little as zero in the southern desert regions to as much as 100 inches in the mountainous north coast regions. The overall runoff in the state varies from year to year, for example, with a low of 15 million acre-feet in 1977 and a high of 135 million acre-feet in 1983. Sixty percent of the state's precipitation is transpired by trees and other vegetation. Half of the approximately 71 million acre-feet of water left ends up as runoff that gathers in streams and other watercourses and flows through the Delta.

Due to the need to prevent seasonal flooding that caused serious damage to farms and cities along the Sacramento and San Joaquin Rivers and to ensure a reliable water supply for various water users, the federal Central Valley Project ("CVP") was built beginning in 1937, with the

first water deliveries in 1940. Later, in order to address the need to redistribute water supply from areas of surplus to areas of deficiency, the State Water Project ("SWP") was built beginning in 1967, with first water deliveries in 1971.

The ecology of the Bay-Delta is continually evolving and changing as it has been since its discovery. There are a number of factors affecting the wildlife and fishery habitat and the quality of drinking water and other water supply needs for consumption by residential, farming and municipal and industrial users. These factors are broadly acknowledged and include both natural phenomena, e.g., organic carbon, saltwater intrusion, disease, and predation; and human activities, e.g., waste discharges, introduction of invasive species, unscreened diversions, overfishing of some species, fish barriers, and channel alterations, among other things. Government agencies have convened a number of fora and attempted various woefully ineffective efforts to address the current conditions in the ecology of the Delta with the consequent ESA listing of the delta smelt, among other species (*e.g.,* salt marsh harvest mouse, valley elderberry longhorn beetle, and various salmonid species.)

Until 2007, the most prominent forum for regulatory agencies charged with core regulatory responsibilities in the Bay-Delta was collectively known as CALFED, a conglomeration of 18 state and federal agencies with management or regulatory authority over the Bay-Delta, including the California Resources Agency, the State Water Resources Control Board, the Department of Water Resources, California Department of Fish and Game, the U.S. Bureau of Reclamation, National Marine Fisheries Service, the U.S. Fish and Wildlife Service, The Army Corps of Engineers, and the Environmental Protection Agency. This group was convened for two primary reasons: the March 1993 listing of the delta smelt as a threatened species and the litigation deadlock being experienced by various agricultural, environmental and urban water users with respect to Delta water problems. In June 1994, these agencies signed an agreement (the Framework Agreement) to coordinate their activities in three areas: 1) operating the CVP and SWP to meet environmental mandates; 2) establishing water quality standards; and 3) developing a long-term strategy for managing the Delta.

In December 1994, the CALFED agencies signed a document known as the Bay-Delta Accord that set interim water quality standards and constrained operation of the water projects for a three year period, later extended to 2000. The Accord committed additional fresh water flows to the Delta and was intended to protect the supplies to water users in the event additional water commitments were required by further species listings under the ESA. During that same month, the State Water Resources Control Board issued a draft water quality plan for the Delta, later finalized in 1995. As a result of the Framework Agreement and the Bay-Delta Accord, the CALFED agencies launched the ambitious CALFED Program with the stated objective of coordinating management of California's most precious resource, water. CALFED has to date spent billions of dollars in state bond money, federal appropriations and contributions by water users with very little to show for it.

II. The Mega-Judge's Dilemma

Litigation over the Bay-Delta has continued in spite of CALFED's efforts, and sometimes partly because of it. In July 2007, U.S. District Court Judge Oliver Wanger issued Findings of Fact and Conclusions of Law concerning a lawsuit filed by environmental litigants challenging the 2005 Biological Opinion issued by the FWS on Operating Criteria and Procedures ("OCAP") for coordinated operation of the SWP and CVP. The court's findings highlight the glaring scientific uncertainties and the agencies' ongoing and inexcusable failure to ascertain the true needs of listed species in the Bay-Delta and the water users who depend upon the Delta as a hub for water supplies. Uncertainties pinpointed by the court include whether a group of agency fishery biologists' recommendations to reduce pumping would be **necessary and effective to protect the delta smelt from extinction;** unresolved sharply conflicting evidence regarding whether other causes of delta smelt decline, including but not limited to, other water diversions, effects of ocean tides, presence of toxics, absence of delta smelt prey, and existence of non-native predators are **materially causing a decline in the species.**

When evaluating what is at stake in trying to resolve the Bay-Delta conflicts and the jeopardy status of the species, the court considered such things as the potential catastrophic loss of water supplies to urban water users, including but not limited to, cities, fire protection agencies, hospitals and health providers, schools, laboratories, and potable water supplies for human consumption; potential catastrophic loss of water supplies to contractors dependent on SWP and CVP water supplies; potential physical damage to the San Luis Reservoir due to gross reduction of its water supplies and being removed from service for over one year; economic damage to crops in the range of $23 million to $1 billion. (*See NRDC v. Kempthorne, 1:05-CV-1207 (E.D. Cal. July 3, 2007).*

Further, Judge Wanger specifically called out some of the types of thorny issues courts are being asked to confront when addressing disputed ESA actions in litigation:

> *"...There is legal uncertainty about the constitutional ability of the Court in potential violation of the separation of powers doctrine, to grant operating authority over the CVP to the DSWG [Delta Smelt Working Group], a group of fishery biologists." (Id. at p.29).*

> *"...The form of the [Plaintiffs']order is so vague, overbroad, and uncertain that it requires an agency of the United States government to defer and follow all the recommendations of the DSWG, a group of fishery biologists, who are neither trained in nor have competence in engineering, risk management, water management, and the related disciplines that affect the protection of health and safety and the human environment and preservation of the infrastructure comprising CVP and SWP facilities."(Id.).*

Meanwhile, in *Natural Resources Defense Council, et al. v. Rodgers, et al., Civ. No. S-88-1658-LKK/GGH,* U.S. District Court Judge Lawrence Karlton has continuing jurisdiction over the settlement of longstanding disputes regarding recovery of salmonid species through restoration of habitat and flows on the San Joaquin River in the counties of Madera, Fresno, Tulare, Kings and Kern, some of the richest and most productive farm land in the world. This is

the same San Joaquin River that is the subject of delta smelt and salmon litigation pending before Judge Wanger, and the water users affected are contractors in the Friant Division of the CVP. This settlement deal was struck in lieu of having Judge Karlton fashion a remedy in the courtroom by presiding over a battle among competing scientists representing various non-agency litigants versus those representing agencies.

Without a doubt, agencies charged with implementing the ESA cannot be allowed to run roughshod over the regulated community or other interested parties without being subject to judicial challenges. But those challenges have their limitations in administrative law jurisprudence. For example, in a challenge of a critical habitat designation under the ESA, Judge Royce Lambert in *The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of the Interior, 344 F. Supp. 2d 108 (D.D.C. 2004)* noted two rules of deference that applied to review of agency action there under the Administrative Procedure Act, 5 U.S.C. §706. The Chevron rule applies to an agency interpreting a statute it administers. (*See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984)* (If the statute clearly speaks to the precise question at issue, that ends the matter. If, on the other hand, 'the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute')). The Auer rule applies to an agency interpreting its own regulation. (*See Auer v. Robbins, 519 U.S. 452, 461(1997)* (An agency interpretation of its own regulation controls unless 'plainly erroneous or inconsistent with the regulation', but Auer deference is warranted only when the language of the regulation is ambiguous)).

Judge Lambert deferred to the U.S. Fish and Wildlife Service's ("USFWS") expertise in interpreting the meaning of the ESA term "occupied", stating "this Court has no expertise when it comes to determining which lands a migratory bird does or does not occupy. (*The Cape Hatteras Action Preservation Alliance, 344 F. Supp. 2d at 120).* As for the application of the Auer rule, Judge Lambert found the plaintiffs had not met their burden for challenging the use of ephemeral reference points in the critical habitat designation, even though there was "some ambiguity" in the regulation concerning what "ephemeral" includes; the agency interpretation was reasonable.

In the delta smelt OCAP challenge, Judge Wanger invalidated the 2005 Biological Opinion and remanded the OCAP consultation to the USFWS, with a current court deadline of December 15, 2008 for the issuance of a new biological opinion. *(See NRDC v. Kempthorne, 1:05-CV-1207 (E.D. Cal. September 22, 2008).* It remains to be seen whether this time around Judge Wanger will find the biological opinion is scientifically sound and legally defensible because it reflects review of all of the best scientific and commercial data available as required under the ESA. *(16 U.S.C. §1536(a)(2)).* The difference in outcome may hinge on whether the scientific data continues to be cherry-picked for a predetermined result rather than evaluated as a whole to reach an outcome that meets the ESA requirements for the species. Agencies should not get deference when they ignore best available scientific data, but neither should a federal judge be asked to do the work with which the agencies are charged.

III. The Science of Recovery

There is an overarching need to assess the regulatory effectiveness of efforts under the ESA, which should be naturally reflected in adherence to the ESA's "best available science" standard. Beginning with *TVA v. Hill*, 437 U.S. 153 *(1978),* judges, regulatory agencies, the

regulated community, and regular citizens have grappled with the possibly dire consequences of complying with the ESA. The statute under section 7 provides for reasonable and prudent alternatives if a species is found to be jeopardized by an action authorized, funded or carried out by a federal agency. *(16 U.S.C. §1536(b)(3)(A)).* In the delta smelt OCAP Biological Opinion litigation, Judge Wanger's interim order required the severe curtailment of pumping by the CVP and SWP to protect the species. The resulting cutbacks in water supplies will force some farmers to go out of business and require other water users to change how they plan for services, but the question remains whether reductions in pumping are necessary and effective to protect the species. This decreasing water supply reliability must be addressed and the science must be thoroughly developed and reviewed to verify that the restrictions on water use have a sound scientific basis based on best available data; more than "fish need water". Ideally, the new biological opinion will reflect this much needed closer examination.